NO. 48720-9

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CARISSA D. CANNON, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 14-1-05123-1

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# BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly limit the inquiry into the co-defendant's plea agreement in accordance with the relevant case law? (Appellant's Assignment of Error 1).

2. Did the trial court make a proper inquiry into defendant's ability to pay LFOs when it considered defendant's education level, current age, and future earning potential at the time she has completed her sentence? (Appellant's Assignment of Error 2).

B. STATEMENT OF THE CASE.

1. Procedure

On February 1, 2016, the Pierce County Prosecutor's Office filed an amended information charging CARISSA CANNON, hereinafter, "defendant," with robbery in the first degree with a deadly weapon sentencing enhancement. CP 7-8. The Honorable Judge James Orlando presided over the trial. RP 1.

During trial, defendant's co-defendant in the case, Mr. Samuel L. Jackson, testified for the State. 3RP 382-425. He had previously entered into a plea agreement with the State in exchange for testifying during the defendant's trial. 3RP 382-392. The trial court held that the State could only discuss certain terms of the plea agreement in its direct examination but if Mr. Jackson was impeached on cross, the State could go into other relevant terms of the agreement at that point. 3RP 382-392.

The jury found defendant guilty of robbery in the first degree and she was sentenced to 140 months, plus a 60 month deadly weapon sentencing enhancement. 4RP 542-544, 5RP 556; CP 27. The trial court also imposed $2,300.00 in LFOs. *Id*; CP 25-26. Defendant filed a timely notice of appeal on February 19, 2016. CP 34.

2. Facts

On December 19th, 2014, Ludwin Borgen wemt on a blind date with a female named Aliyah[1]. 3RP 240. Aliyah asked Mr. Borgen for a ride to a friend's house in south Tacoma after the date and he obliged. 3RP 242. Mr. Borgen parked his vehicle outside the friend's residence and he and Aliyah entered the residence where several people were socializing, including defendant. 3RP 243-244. He witnessed Aliyah purchase crystal meth from two men upstairs. 3RP 246-247. Shortly after, Mr. Borgen and Aliyah went downstairs to leave, where he saw a man, later identified as Samuel L. Jackson and a woman, later identified as the defendant. 3RP 250. Mr. Borgen and Aliyah left, and after driving about 500 feet, he noticed something was wrong with his vehicle and discovered both back tires had been slashed. 3RP 251. He exited the vehicle and Aliyah advised she would go look for the necessary tools to remove the tires; she did not return. 3RP 254.

[1] Mr. Borgen testified that this was the only name she told him. 3RP 241.

While Mr. Borgen attempted to work on his vehicle, he saw defendant approach him and then walk away. 3RP 257. Defendant then returned 5-10 minutes later, this time with Mr. Jackson behind her. 3RP 264. Defendant and Mr. Jackson were dressed in all black and Mr. Jackson's face was covered by a makeshift mask made out of a black T-shirt. 3RP 265; 405-406. Defendant was armed with a Ruger 22 and Mr. Jackson carried a BB gun. 3RP 405-407. Mr. Borgen realized Mr. Jackson had a gun in the waistband of his pants and defendant had a gun in her hand. 3RP 264-265. Defendant pointed the gun at Mr. Borgen and ordered him to walk to a nearby alley. 3RP 266.

Mr. Jackson then demanded Mr. Borgen remove everything from his pockets, which included his wallet, which he believed had $400-$500 in cash, a half pack of cigarettes, a flashlight, a socket wrench, and two cell phones, one of which was an Alcatel brand. 3RP 267-269; 3RP 409-410. Defendant picked up the items and Mr. Jackson instructed her to hold onto everything. 3RP 410. Defendant then demanded Mr. Borgen hand over the methamphetamine Aliyah had purchased that night. 3RP 272-273. Defendant threatened, "If you don't give me the drugs, I'm going to pop you," and made an aggressive gesture with her hand as if she was going to follow through with her threat. 3RP 273. Mr. Borgen repeatedly stated he did not have the drugs, so defendant demanded the keys to Mr. Borgen's vehicle and left to search it. *Id.* Mr. Jackson then began walking Mr. Borgen out of the alley, and, when he turned to look

for defendant, Mr. Borgen was then able to run toward a patrol car stopped at a red light. 3RP 45.

Officer Halfhill testified he was waiting at the red light a few blocks from the house Mr. Borgen had been at with Aliyah when he witnessed Mr. Borgen running toward his patrol vehicle, waving his arms and screaming. 2RP 103. Officer Halfhill rolled down his window and Mr. Borgen, frantically explained that he had just been robbed by a man with a gun. *Id.* He pointed out the man who had robbed him, Mr. Jackson, who was then running down an alleyway with another man. *Id.* Officer Halfhill chased Mr. Jackson through a parking lot and into the driveway of a house before taking him into custody. 2RP 105-107.

During Mr. Jackson's arrest, Officer Halfhill discovered a ripped T-shirt that had been fashioned into a mask on the property. 2RP 113-114. Mr. Jackson denied ownership of the mask, as well as any involvement in the robbery. 2RP 115. During his pursuit of Mr. Jackson, Officer Halfill recalled hearing a suspicious thump and searched the area for its cause. 2RP 116. He found a loaded .22 Ruger pistol was found on the roof of the preschool. 2RP 116, 170-171; Ex. 44, 45. He noticed the firearm was dry, despite the fact it had been raining earlier that evening, indicating it had not been on the roof for long. 2RP 172.

Officer Butts became involved in the robbery investigation after receiving a call from Officer Halfhill around 2:56 a.m. 2RP 181. He advised Officer Butts that Mr. Borgen's car was purportedly nearby and

that a woman who was also possibly involved in the robbery was nearby as well. 2RP 181. Officer Butts approached Mr. Borgen's vehicle, where he found defendant sitting in the driver's seat. 2RP 184. He detained her and she exited the vehicle. 2RP 184. Officer Butts searched defendant and located two cell phones—a black flip phone and a Kyocera cell phone—a pair of pliers, and a wound up USB phone charging cord. 2RP 187. He also located $380.00 in the back pocket of defendant's pants. 2RP 195-196. In the vehicle, Officer Butts found Mr. Borgen's wallet and I.D. in the back driver's side seat, a half empty pack of cigarettes in the driver's seat, and a black Alcatel brand cell phone on the front passenger floorboard. 2RP 191-192. He also located a black BB gun pistol under the front passenger seat. 2RP 192. Defendant was arrested and taken to the Pierce County Jail. RP 32-33.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN LIMITING THE TESTIMONY ABOUT THE CO-DEFENDANT'S PLEA AGREEMENT IN LIGHT OF ***STATE V. ISH,*** 270 Wn.2d 189, 241 P.3d 389 (2010)[2].

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to present a defense. ***State v. Starbuck***, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015) (*citing* ***State v. Strizheus***, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011), *review denied*, 173 Wn.2d 1030, 274 P.3d 374 (2012)). An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. ***State v. Franklin***, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014). But, a criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. ***Starbuck***, 189 Wn. App. at 750. A defendant's constitutional right to present a defense in a criminal case consists of

[2] In his brief, defendant makes a very brief argument that if this issue was not preserved for appeal by defense counsel's failure to object to the court's ruling, then defense counsel was ineffective. Brief of Appellant at 16. Defendant does not assign error to counsel's failure to object and fails to cite any law or provide a thorough analysis about why such action was ineffective. Because a confrontation clause violation of this sort is a manifest constitutional error reviewable under RAP 2.5(a)(3) and defendant has not assigned error to any failure to object, the State will not address defendant's ineffective assistance of counsel portion of his argument. ***State v. Hudlow***, 182 Wn. App. 266, 277, 331 P.3d 90 (2014).

relevant evidence that is not otherwise inadmissible. ***State v. Austin***, 59 Wn. App. 186, 194, 796 P.2d 746 (1990). Furthermore, a defendant's constitutional right to present a defense is not necessarily impinged by a trial court's exclusion of minimally relevant evidence. *See* ***State v. Summers***, 70 Wn. App. 424, 435, 853 P.2d 953 (1993).

Evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Evidence must be at least minimally relevant to be admissible. ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Relevant evidence "may be excluded if its probative values is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. A defendant's interest in presenting relevant evidence may "'bow to accommodate other legitimate interests in the criminal trial process.'" ***Rock v. Arkansas***, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (*quoting* ***Chambers v. Mississippi***, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). The admission or refusal of evidence lies largely within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987).

a. The trial court properly limited the inquiry of the plea agreement terms to what was permissible under the relevant case law.

Defendant claims that the trial court erred when it excluded his co-defendant, Mr. Jackson's, plea agreement, preventing him an opportunity to meaningfully cross-examine and impeach Mr. Jackson. Brief of Appellant at 2; *See* CP 38-40 (Exhibit 51). Throughout his brief, defendant argues that the trial court excluded evidence of pertinent details of the co-defendant's plea agreement and fails to clearly articulate what those details were and how their exclusion prejudiced the defendant. Brief of Appellant, 7-13. The only reference to the specific details defendant argues were not before the jury was the fact that the State would only allow Mr. Jackson to withdraw his original plea if his testimony was truthful and that the State had the option of requiring Mr. Jackson to take a polygraph test to verify the truthfulness of his testimony. Brief of Appellant at 9. Defendant also appears to argue it was an error that the written agreement itself was not admitted. Brief of Appellant at 8-9.

In discussing witness plea agreements, the Washington Supreme Court has stated:

> Courts should carefully scrutinize agreements and exclude language that is not relevant to the defendant's impeachment evidence or tends to vouch for the witness's testimony. While the State may ask the witness about the terms of the agreement on redirect once the defendant has opened the door, prosecutors must not be allowed to comment on the evidence, or reference facts outside of the

> record that implies they are able to independently verify that the witness is in fact complying with the agreement.

***State v. Ish***, 270 Wn.2d 189, 199, 241 P.3d 389 (2010). The Court described concerns about how plea agreement promises of truthfulness may amount to vouching and were generally self-serving and irrelevant, particularly when admitted in the State's case in chief. *Id.* at 198.

With this in mind, the trial court in the present case properly exercised its discretion by allowing into evidence the information in Mr. Jackson's plea agreement which was relevant to Mr. Jackson's bias and motive in testifying against the defendant, while excluding irrelevant portions of the plea agreement which ***Ish***, *supra*, was concerned with. *See* 3RP 383-92. The trial court allowed the State to discuss specific terms of the agreement, but ruled that the State could not inquire into the requirement that Mr. Jackson's testimony be truthful and that he was potentially subject to a polygraph until and unless the defense attorney called Mr. Jackson's credibility into question in accordance with ***Ish***. 3RP 390-92; CP 38-40 (Exhibit 51).

The plea agreement terms that Mr. Jackson's testimony be truthful and he was subject to a potential for a polygraph test was the very type of information that the Court in ***Ish*** was concerned could lend an impermissible aura of credibility to the co-defendant's statement prior to

that credibility being impeached by the defendant. By introducing such evidence prior to any attack on the credibility of the witness, the information becomes somewhat self-serving and amounts to vouching for the witness. ***Ish***, 170 Wn.2d at 198. Such information has little relevance at that point and it only becomes relevant for purposes of rehabilitating a witness once their credibility has been attacked. *Id.* As such, the trial court's exclusion of the fact that Mr. Jackson's plea agreement required him to tell the truth and he could potentially be subjected to a polygraph test was a proper limitation of the terms of the plea agreement at that time in the proceedings in light of ***Ish***.

The decision not to admit the written plea agreement itself[3] was also proper as it contained inadmissible evidence and the remaining information was cumulative. As described above, two of the terms of the agreement were inadmissible at that point in the proceedings under ***Ish***. The remaining terms of the agreement were discussed in Mr. Jackson's testimony. Mr. Jackson confirmed his testimony was based on a plea agreement for robbery in the first degree with a firearm, and unlawful

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[3] Although there was no motion to admit the written plea agreement, the court appeared to rule that it would not be admissible and could only be used as an exhibit from its language in the following exchange:

> Court: the specific language in the [***Ish***] opinion is that the state could not offer the plea agreement as an exhibit during its direct examination.
> Prosecutor: You can use it as an exhibit, but not offer it up.
> Court: Correct.

3RP 390.

possession of a firearm in the first degree. 3RP 393-394. He acknowledged his standard sentencing range was 87 to 116 months on an unlawful possession of a firearm charge, and 129 to 171 months with an additional 60 months for possessing a firearm. 3RP 394.

He then discussed the terms of his plea agreement which revealed the extent of the benefit Mr. Jackson expected to obtain from testifying. Mr. Jackson confirmed that if he was allowed to withdraw his plea at the end of testifying, he would enter a plea of guilty to robbery in the second degree and unlawful possession of a firearm in the second degree—a significantly reduced charge. 3RP 394. He stated this would result in him facing an 84-month sentence and he would not know whether he would be receiving the reduced sentence until the end of the trial. *Id.*

Through this testimony, the jury learned all of the relevant and admissible terms that the written plea agreement itself contained. CP 38-40 (Exhibit 51). Although relevant, evidence may be excluded if its probative value is substantially outweighed ... by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 401; ER 403. Admission of the written plea agreement would have been purely redundant as the jury was already aware of all the information through Mr. Jackson's testimony. The trial court properly excluded Mr.

Jackson's written plea agreement as it contained inadmissible information and the relevant information was already before the jury.

b. Any error in Mr. Jackson's credibility not being questioned further was harmless given the instructions to the jury and other evidence in the case.

Confrontation clause errors require reversal unless the State shows it is harmless beyond a reasonable doubt. ***State v. Jasper***, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Assuming the exclusion of certain portions of Mr. Jackson's plea agreement amounted to a confrontation clause violation, any error in their exclusion was harmless beyond a reasonable doubt. Even if Mr. Jackson's testimony could have been called into question further by learning about the other terms of the plea agreement, the failure to do so was harmless in light of the court's instructions to the jury and the other evidence that was presented. The jury was instructed to carefully evaluate Mr. Jackson's credibility and consider the other evidence in the case as well. The court instructed the jury as follows:

> Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP 43-55 (Instruction No. 5).

The jury also heard testimony from the victim and police officers which established defendant's participation in the robbery independent of Mr. Jackson implicating her. The victim, Mr. Borgen, identified the defendant as helping Mr. Jackson during the robbery. 3RP 263-76. He described that it was the defendant who ordered him to walk to the alley and remove everything from his pockets. 3RP 266-68. Mr. Borgen stated he gave the defendant his two cell phones and she grabbed his wallet off the trash can after he placed it there. 3RP 269-72. Mr. Borgen testified that throughout this time both the defendant and Mr. Jackson pointed their firearms at him. 3RP 273.

The defendant was also found in possession of Mr. Borgen's cell phones at the time she was discovered sitting in his vehicle and searched. Officer Halfhill testified that he located two phones in defendant's left jacket pocket while he was searching her after she was found in Mr. Borgen's vehicle. 2RP 140. One was an Alcatel smart phone, and the other was a T-Mobile flip phone, both identified during trial by the victim as his phones. 2RP 140, 3RP 268. He also located a third phone in the vehicle, as well as Mr. Borgen's cash. 2RP 140, 187. When Officer Halfhill searched Mr. Jackson, he did not discover any of Mr. Borgen's phones or possessions. 2RP 152.

Given all of this, there was ample evidence for the jury to find defendant was guilty of robbery in the first degree even if the credibility of Mr. Jackson's testimony was attacked during the trial. Any error in the admission of the terms of the plea agreement to attack Mr. Jackson's credibility was thus harmless beyond a reasonable doubt in light of the other evidence implicating defendant in the robbery.

c. Defendant's reliance on ***Farnsworth*** is misleading and misplaced.

Defendant argues that the present case is comparable to the recent case of ***State v. Farnsworth***. 185 Wn.2d 768, 374 P.3d 1152 (2016). Brief of Appellant at 11-13. In that case, Chief Justice Madsen joined the four dissenting justices to create a plurality opinion finding that the exclusion of the co-defendant's plea agreement was constitutional error. ***Farnsworth***, 185 Wn.2d at 790. Defendant cites to and relies on this holding and analysis for much of his comparison. But, while Chief Justice Madsen joined the dissenting opinion in finding an error, she concurred with the majority opinion to hold that any error in excluding the plea agreement was harmless beyond a reasonable doubt. ***Farnsworth***, 185 Wn.2d at 784-85, 790.

Not only is any error in the present case likewise harmless beyond a reasonable doubt for the reasons described above, the defendant's comparison to the dissent's reasoning for why it was not harmless is

misplaced. In ***Farnsworth***, the dissent's rationale for why the exclusion of the co-defendant's plea agreement was not harmless stemmed from the fact that in their opinion, the co-defendant's testimony about his plea agreement differed substantially from what it actually was. *See* ***Farnsworth***, 185 Wn.2d at 796 ("The lead opinion rejects the confrontation clause claim, though, because it concludes – as the State and the trial court – that McFarland's testimony was close enough to the truth that the real truth did not matter.... But it really was not that close.") The co-defendant initially testified that he had pleaded guilty to first degree theft where his plea agreement actually showed he had pleaded guilty to both first degree theft and first degree robbery, with the latter charge being removed if he testified. *Id.* at782. From this, the dissent described how the co-defendant had a greater incentive to testify favorably for the State than he admitted and how the jury did not hear how he was unable to describe things in his plea agreement despite having initialed specific provisions of it. *Id.*

None of that happened in the present case. Mr. Jackson testified in detail about the terms of his plea agreement in accordance with what those terms actually were. 3RP 393-94; CP 38-40 (Exhibit 51). This allowed the jury to fully consider the benefit he could potentially receive and the motivations he had in testifying. The dissent's rationale for finding that the exclusion of the plea agreement in ***Farnsworth*** was not a harmless error is simply not comparable to the present case.

Furthermore, the majority in ***Farnsworth*** found the exclusion of the plea agreement would be a harmless error even with the co-defendant's differing testimony.[4] They held that because the co-defendant explained to the jury that in testifying for the State he was receiving the benefit of not facing a third strike, any error in failing to reconcile the exact terms of his agreement was harmless as the jury was aware of and able to evaluate the co-defendant's motivations in testifying. Such is the same in the present case as the jury learned of all the relevant terms of Mr. Jackson's plea agreement through his direct testimony allowing them an opportunity to fully evaluate his motivations. Most important to this analysis is that Mr. Jackson's testimony was entirely consistent with his plea agreement, unlike Farnsworth's co-defendant where even with such differing testimony the Supreme Court still found the exclusion of the plea agreement was a harmless error.

Defendant's reliance on the ***Farnsworth*** case is misleading. When the facts of the present case are reviewed in light of the rationale of both the majority and the dissent in ***Farnsworth***, it is apparent that regardless of whether the exclusion of Mr. Jackson's plea agreement was an error in the present case, any error was harmless as the jury was fully aware of the

[4] Four justices in the majority found the exclusion of the plea agreement was not a constitutional error and Chief Justice Madsen joined the dissent on this point in finding that it did in fact amount to a constitutional error. ***Farnsworth***, 185 Wn.2d at 781-84, 790.

benefit Mr. Jackson was receiving in testifying and able to properly evaluate his credibility in an appropriate way as ***Ish***, *supra*, discusses.

2. THE TRIAL COURT CONDUCTED A PROPER INQUIRY INTO DEFENDANT'S ABILITY TO PAY WHEN IMPOSING LEGAL FINANCIAL OBLIGATIONS BY CONSIDERING DEFENDANT'S EDUCATION LEVEL, CURRENT AGE, AND FUTURE EARNING POTENTIAL AT THE TIME SHE WILL HAVE COMPLETED HER SENTENCE.

In ***Blazina***, the Washington State Supreme Court held that the sentencing judge must consider the defendant's individual financial circumstances and make an individualized inquiry into the defendant's current and future ability to pay, and that the record must reflect that inquiry. ***State v. Blazina***, 183 Wn.2d 827, 837-838, 344 P.3d 680 (2015). The court also reiterated that, by statute, the court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them. *Id.* at 838, RCW 10.01.160(3). To determine the amount and method for paying the costs, the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. *Id.*

Here, on the record, the court conducted an individualized inquiry into defendant's future ability to pay. 5RP 557. The court reasoned that defendant is a young woman and will have earning potential upon

completing her sentence. *Id.* The Court also learned that, although defendant had not finished high school, she alternatively did obtain a GED. 5RP 555. By taking into account defendant's level of education, current age, and her age at the time of her release, the court individually analyzed defendant's ability to pay discretionary LFOs.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's conviction and sentence.

DATED: OCTOBER 24, 2016

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Date Signature

# PIERCE COUNTY PROSECUTOR

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